Black Magic Resources, Inc. *and* Terry Lawrence *and* Rod Osborn

B. J. Excavating Company, Inc. *and* Terry Lawrence *and* Rod Osborn. Cases 26–CA–14509, 26–CA–14627, 26–CA–14717, and 26–CA–14718

May 31, 1995

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

This compliance proceeding presents several issues concerning the Respondents' backpay and reinstatement obligations to discriminatees Terry Lawrence and Rod Osborn.[1] The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

By Decision and Order dated September 30, 1993,[2] the Board found that the discharges of Lawrence and Osborn on May 13, 1991, violated Section 8(a)(3) and (1) of the Act. Specifically, the Board found that Respondent Black Magic Resources, Inc. (Black Magic) and Respondent B. J. Excavating Company, Inc. (BJ) had discharged Osborn from separate and distinct jobs with each employer because he had filed a grievance with the Union. The Board further found that BJ discharged Lawrence because he filed a grievance with the Union. Finally, the Board ordered that BJ reinstate Lawrence, that Black Magic and BJ separately reinstate Osborn, and that Black Magic and BJ, jointly and severally, make Lawrence and Osborn whole for the losses suffered as a result of their unlawful discharges.

We agree, for the reasons set forth by the judge in his supplemental decision, that the General Counsel has failed to prove a reasonable basis for computing backpay at rates set forth in the National Bituminous Coal Wage Agreement (NBCWA) for the discharges from jobs with BJ. In this regard we note that BJ is not a signatory to the NBCWA. We also agree with the judge that Black Magic has no reinstatement obligation to discriminatee Lawrence. Finally, we adopt the judge's findings with regard to the amount of backpay due Lawrence until such time as BJ makes a proper offer of reinstatement to him.

The judge concluded that the Respondents did not owe Osborn any backpay for the entire period since his discharge because he failed to undertake a reasonable effort to find interim employment. We disagree. For the reasons set forth below, we find that the Respondents have failed to establish that Osborn neglected to make reasonable efforts to seek interim employment.

It is well settled that an employer may mitigate its backpay liability by showing that a discriminatee ''neglected to make reasonable efforts to find interim work.'' *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (5th Cir. 1966). This is an affirmative defense, however, and the burden is on the employer to show the necessary facts. The employer does not meet this burden by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings. *Aircraft & Helicopter Leasing*, 227 NLRB 644, 646 (1976). Further, the standard to which an employee's efforts are held is one of reasonable diligence, not the highest diligence, and he or she need not exhaust all possible job leads. *Lundy Packing Co.*, 286 NLRB 141, 142 (1987). Finally, in determining whether an individual claimant made a reasonable search, the Board looks to whether the record as a whole establishes that the employee has diligently sought other employment during the entire backpay period. *Saginaw Aggregates*, 198 NLRB 598 (1972); *Nickey Chevrolet Sales*, 195 NLRB 395, 398 (1972). Any uncertainty in the evidence is resolved against the Respondents as the wrongdoers. *NLRB v. Miami Coca-Cola Bottling Co.*, supra; *Southern Household Products Co.*, 203 NLRB 881 (1973).

In the instant case, Osborn registered with the Kentucky State Employment Services office (KSES) for the 2-year period from September 1991 through September 1993.[3] During that period, he received no referrals. Although the judge notes that Osborn moved three times during that period and failed to notify KSES of his new address, there is no evidence that Osborn's frequent moves impeded any attempts to contact him. The testimony of KSES official, Dorothy Johnson, indicates that no attempts were made to contact him.

The judge also cites Osborn's failure to make any written or personal applications for work at mines or other facilities in the area. The Respondents offered no evidence that there were available jobs that Osborn could have filled had he applied in the manner suggested. Furthermore, the record indicates that the condition of the labor market in the area of Madisonville, Kentucky, was poor. Johnson testified that, from approximately 1991 through 1993, the Madisonville area was experiencing an ''economic slump,'' and the ''job

[1] On November 8, 1994, Administrative Law Judge Stephen J. Gross issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief. Respondent Black Magic Resources, Inc. filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] 312 NLRB 667.

[3] Although registration with a government employment office alone does not establish the reasonableness of an employee's search for interim employment, it is a factor to be weighed in determining whether the search has been reasonably diligent. See *Laredo Packing Co.*, 264 NLRB 245, 246 fn. 4 (1982) (citing *Rogers Furniture Sales*, 213 NLRB 834 (1974)).

market wasn't good during that period of time.'' Richard Litchfield, president of Mine Workers District 23, testified without contradiction that in the last 3 years layoffs had reduced the Union's active members from 2000 to 1500 and that the current number of members laid off was approximately 3000. Litchfield also testified to a number of plant closings in related industries. In the last 3 years, according to Litchfield, the Birmingham Bolt, York, and Goodyear facilities in Madisonville closed.

Although Osborn did not apply in writing or in person at area mines and plants during the backpay period, he did at least twice a week ask family members, friends, and acquaintances about job opportunities. In addition, during all three summers of the backpay period, Osborn periodically sought work from farms he drove past. Through these efforts, Osborn secured various jobs including farmwork, cutting and stripping tobacco, yard work, cutting trees and firewood, clearing land, hauling gravel and trash, selling scrap, cleaning construction sites, and moving and hauling household goods. Osborn also testified without contradiction that he never refused an offer of work.

In sum, during the 3-year backpay period, Osborn managed to earn some income during every quarter through unskilled laborer work on a self-employed basis. It is well settled under Board precedent that self-employment can be an adequate and proper way for a discriminatee to attempt to mitigate loss of wages. *Fugazy Continental Corp.*, 276 NLRB 1334 (1985) (citing *Heinrich Motors*, 166 NLRB 783 (1967), enfd. 403 F.2d 145 (2d Cir. 1968)).

Contrary to our dissenting colleague, we neither speculate that there was no work nor use such speculation to excuse Osborn's failure to search for work. As even the judge conceded, Osborn *did* search for work. Although he registered with KSES, he relied primarily on a ''word-of-mouth'' job search through a network of family, friends, and neighbors. For all we know, this strategy may not only have been reasonable, it may have been the most appropriate one for a man of Osborn's circumstances. The Respondents bear the burden of proving otherwise. They cannot do this merely by showing that there were companies or mining operations to which Osborn had time to apply because his job search method yielded few job opportunities. They must prove that, in the context of his entire interim job search, it was unreasonable for him not to apply at these facilities. In this regard, it is relevant to refer to evidence indicating whether Osborn would have had any reasonable expectation of success had he applied there.[4] The Respondents have failed to show that any specific jobs would have been available to Osborn at any facility.[5] This factor, Osborn's limited education and skills, and the uncontroverted testimony about a generally depressed area labor market persuade us that the failure to apply for work at area companies and mines did not constitute a willful loss of earnings. Based on the entire record, we conclude that the Respondents have failed to sustain their burden of proving that Osborn did not make a reasonable effort to obtain interim employment.

Having found that Osborn did not engage in a reasonable search for interim employment, the judge found no need to resolve other reinstatement and backpay issues concerning Osborn. These issues include both the determination of the appropriate gross backpay formulae for Osborn's separate jobs with each Respondent and the determination of whether Respondent Black Magic made a valid offer to reinstate Osborn. We therefore find it necessary to remand this case to the judge for the purpose of issuing a second supplemental decision with findings of fact and conclusions of law on these issues.

ORDER

The Respondents, Black Magic Resources, Inc., and B. J. Excavating Company, Inc., their officers, agents, successors, and assigns, shall jointly and severally pay to Terry Lawrence, subject to the normal government-mandated deductions: (1) for the period May 13, 1991, through December 25, 1993, $17,267.51 plus interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987); and (2) for periods subsequent to December 25, 1993, until such times as B. J. Excavating Company, Inc. makes a proper offer of reinstatement to Lawrence, backpay computed at $4,912.18 per quarter ($377.86 per week), less Lawrence's net interim earnings, plus interest.

IT IS FURTHER ORDERED that this proceeding is remanded to the administrative law judge for consideration of the matters discussed above.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a second supplemental decision containing credibility resolutions, findings of fact, conclusions of law, and recommendations to the Board. Following service of the second supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

[4] We assume that our dissenting colleague is not suggesting that Osborn had to supplement his job search with knowingly futile acts in order to avoid forfeiture of his right to backpay.

[5] Contrary to the judge, the fact that discriminatee Lawrence was able to find interim work by making oral inquiries at local mines and plants does not prove that Osborn would have had similar success. Lawrence was a skilled heavy equipment operator. Osborn was a laborer and maintenance employee. There is no evidence that Osborn had the skills to perform the interim work that Lawrence obtained.

MEMBER COHEN, dissenting in part.

The judge found that employee Rod Osborn failed to make reasonable efforts to find interim employment. I think that the judge was correct. Accordingly, Osborn is not entitled to backpay.

Osborn was employed at a mine at the time of his discharge. As found by the judge, however, during the more than 3-year period between Osborn's discharge and the backpay hearing, Osborn never applied for work at any mine. Nor did Osborn apply for work with any private or public employer, or even inquire into the availability of such work. Indeed, although Osborn periodically drove past two of the area's largest factories, not once did he stop to inquire about work.

My colleagues find that Osborn's registration with the Kentucky State Employment Services office (KSES) for September 1991 through 1993 is evidence that he made reasonable efforts to find interim work. Osborn did not contact KSES, however, from the time of his discharge in May 1991 until September 1991. Nor did he contact KSES after September 1993. Further, even when registering there, he did not list all of his laboring skills or the types of work he had performed for previous employers. Instead, Osborn listed only the specific greasing, pumping, and equipment cleaning work he performed with Respondent B. J. Excavating.[1]

The majority also concludes that Osborn made reasonable efforts at self-employment. I disagree. Osborn never advertised that he was interested in or available for work. He merely sought odd jobs with family and friends, or, occasionally in the summer months, made inquiries at area farms if he happened to pass them enroute to visiting his family. In light of the minimal degree of effort at self-employment, I agree with the judge that Osborn's sole reliance on these efforts was not reasonable.

Finally, my colleagues cite poor economic conditions during the backpay period. In essence, they speculate that there was no work, and they then use that premise to excuse Osborn's failure to search for work. I believe that this approach is fundamentally flawed. The law requires a reasonable search for work. If work is found, backpay is reduced; if work is not found, full backpay is warranted. But the important point is that a reasonable search must be made. Similarly, my colleagues cite Osborn's limited education and skills. Again, these factors may well have resulted in Osborn's inability to get a job even if he had sought one, and full backpay would then be warranted. But, as discussed, the critical point is that a reasonable search must be made.

I recognize that the law requires only reasonable efforts, not the impossible. The issue concerns the steps that a reasonable person would take to find a job. I conclude, as did the judge, that a reasonable person would have done more than Osborn did.

My colleagues suggest that ''a man of Osborn's circumstances'' could not be expected to do more than he did to find employment. I fail to see anything about Osborn's ''circumstances'' that would make it unreasonable for him to file an application or at least make an inquiry with the several firms located nearby. Concededly, the record does not establish whether those firms in fact had available positions. However, that is not the issue. Rather, the issue is whether a reasonable person would ask *if* these firms had positions. In agreement with the judge, I believe that a reasonable person would take the minimal step of making that inquiry of local firms. Contrary to the suggestion of my colleagues, I do not require a futile act; I simply expect a reasonable inquiry.

Accordingly, I find that Osborn is ineligible for backpay. In view of this finding, I would not remand this case to the judge for resolution of ancillary backpay issues concerning Osborn.

[1] I find this significant because the odd jobs that Osborn performed following his discharge included a myriad of laborer tasks, none of which was listed on Osborn's registration with KSES.

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SUPPLEMENTAL DECISION

I. INTRODUCTION

STEPHEN J. GROSS, Administrative Law Judge. Respondent Black Magic Resources, Inc. is a coal mining company engaged in strip mining operations near Madisonville, Kentucky. Black Magic's employees are represented by the United Mine Workers of America (the Union). Black Magic is a signatory to the National Bituminous Coal Wage Agreement (BCOA). Respondent B. J. Excavating Company, Inc. (BJE), at one time was in the construction business. It specialized in moving dirt with bulldozers and other equipment it owned and operated. BJE currently has no employees and limits its business to renting equipment to Black Magic. At all relevant times BJE has been nonunion.

Notwithstanding the equipment rental arrangement between Black Magic and BJE, and notwithstanding that BJE's owner, Robert Wilkerson, is an employee of Black Magic, the two companies are, and at all relevant times have been, separate employers. (No party contends otherwise.)

In a Decision and Order that issued on September 30, 1993 (at 312 NLRB 667), the Board concluded that both Black Magic and BJE violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) in their treatment of employees Terry Lawrence and Rod Osborn. The Board held, inter alia, that:

> Osborn worked for both Black Magic and BJE, ''in separate and distinct jobs.''

> Both Black Magic and BJE discharged Osborn on May 13, 1991. Both companies fired Osborn because he filed a grievance with the Union.
>
> BJE discharged its employee Terry Lawrence on that same date, May 13, 1991, because he filed a grievance with the Union. At the time of this discharge Lawrence was an employee only of BJE, not of Black Magic.
>
> Black Magic was ''jointly and severally responsible,'' along with BJE, for the two discharges from BJE.
>
> Black Magic must reinstate Osborn and make him whole the losses he suffered as the result of his unlawful discharge by Black Magic.
>
> BJE must reinstate Lawrence and Osborn.
>
> BJE and Black Magic, jointly and severally, must make Lawrence and Osborn whole for the losses the two employees suffered as a result of their unlawful discharges by BJE.

I will hereafter refer to the foregoing Decision and Order as the Board's ULP decision.

This part of the proceeding (which I will refer to as the backpay case) concerns the backpay due Lawrence and Osborn.[1]

I turn first to the question of whether the Board's ULP decision requires me to use BCOA wage and benefit rates to compute Lawrence's and Osborn's backpay.

II. THE BOARD'S INTENTION AS EXPRESSED IN ITS ULP DECISION

One of the most difficult parts of this case is determining the intention of the Board's ULP decision regarding the rates of pay and benefits due Lawrence and Osborn. Was it the Board's intent that backpay be determined based on whatever rates of pay and benefits that the evidence in the backpay case shows to be appropriate? Or did the Board conclude in the ULP decision that backpay for both Lawrence and Osborn is to be based on the wages and benefits established in BCOA?

The problem is this. Administrative Law Judge Hubert E. Lott, who presided over the unfair labor practice hearing concerning Lawrence and Osborn, concluded that both Black Magic and BJE employed both Lawrence and Osborn. Judge Lott went on to recommend that Black Magic and BJE be required to ''give both Lawrence and Osborn an opportunity to join the Union'' and to pay them backpay at ''contract'' (i.e., BCOA) rates. Thus, Judge Lott's recommended Order requires both Black Magic and BJE to (emphasis added):

> 2. Take the following affirmative action necessary to effectuate the policies of the Act.
>
> (a) Offer Terry Lawrence and Rod Osborn immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits, *at contract rate*, suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.
>
> (b) Give both Lawrence and Osborn an opportunity to join the Union and pay them *contract wages and benefits* from the time they were denied union membership.[2]

The remedy section of Judge Lott's decision follows suit. It reads:

> The Respondents having discriminatorily discharged employees, [they] must offer [the employees] reinstatement and make them whole for any loss of earnings and other benefits, computed at the contract rate on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It is further ordered that both employees be allowed to join the Union and that both receive contract wages and benefits from the time they were denied union membership.[3]

The Board modified Judge Lott's decision in a number of respects. Three of these modifications need to be considered here. First, as my summary of the Board's decision indicates supra, the Board found that Lawrence worked only for BJE; and while Osborn worked for both Respondents, he did so in separate and distinct jobs. The Board's order accordingly divides into separate paragraphs the requirements of Black Magic and BJE in respect to paying backpay to Lawrence and Osborn (in place of Judge Lott's one paragraph).

Second, the Board reversed Judge Lott's conclusion that Black Magic and BJE should be required to ''give both Lawrence and Osborn an opportunity to join the Union.'' Footnote 7 of the Board's ULP decision reads:

> The General Counsel did not allege, nor did the judge find, that the Respondents denied Lawrence and Osborn an opportunity to join the Union. Accordingly, we have modified the judge's recommended Order and notice to delete the provision that they be given an opportunity to join the Union.

The Board's order does indeed delete the above-quoted paragraph 2(b) of Judge Lott's recommended Order.

The Board's order is different from Judge Lott's in another way, one not explicitly discussed in the Board's opinion. That is, the backpay paragraph of Judge Lott's recommended Order (quoted above) specified that Lawrence's and Osborn's backpay was to be computed at ''the contract rate.'' Neither that phrase nor anything like it is to be found anywhere in the Board's order.

On the other hand, the Board's order specifies that backpay is to be computed ''in the manner set forth in the remedy section of [Judge Lott's] decision.'' And, as also quoted above, that provision requires that backpay be computed at

[1] On January 4, 1994, Black Magic and BJE executed stipulations waiving their rights to contest the Board's decision before the Court of Appeals for the 6th Circuit. On April 13, 1994, the Acting Regional Director for Region 26 issued the compliance specification and notice of hearing that began the backpay case. Black Magic and BJE filed timely answers to the compliance specification, and I heard the matter in Madisonville, Kentucky, on July 13, 1994.

[2] 312 NLRB 667 (Judge Lott's recommended Order is omitted from the Board's published decision.)

[3] 312 NLRB at 673.

''the contract rate'' and that both Lawrence and Osborn ''receive contract wages and benefits.''

That reference by the Board to the remedy section of Judge Lott's decision at first blush seems very clear: Backpay is to be computed at contract rates. The trouble is that the Board obviously did not really mean to adopt the remedy section in full. Judge Lott's remedy section, after all, provides that ''both employees be allowed to join the Union.'' Yet the Board explicitly reversed Judge Lott in that respect.

Additionally, the Board's modification of the ordering paragraphs' backpay language to delete the ''at contract rate'' phrase suggests that the Board intended to leave open, for determination in the backpay case, just what rates of pay and benefits were appropriate for calculating backpay.

Where all this takes me is that I consider the language of the Board's ULP decision, standing alone, to be ambiguous. And that brings us to the evidence adduced in the first stage of this case, the stage dealing with the merits of the unfair labor practice allegations (the ULP case).

The salient piece of information in this connection is that BJE was and is nonunion it has never had any contractual relationship with the Union (or with any other union). Given this state of affairs, I can think of no reason why the Board would have concluded that Lawrence's and Osborn's discharges from BJE should result in backpay at the ''contract rate.'' (I will assume, for the purpose of discerning the meaning of the Board's ULP decision, that any backpay that Black Magic owes as a result of its termination of Osborn's employment should be computed at the contract rate. I touch on this again in sec. IV,B, below.)

At the time of his discharge by BJE, Lawrence was working primarily as an equipment operator, on equipment owned by BJE, at Black Magic's strip mine. (Black Magic paid an hourly rental fee to BJE for the use of BJE's equipment. Black Magic paid BJE $12 more per hour when BJE supplied an operator with its equipment than when the equipment came without an operator.) And Osborn's work for BJE involved maintenance work on the equipment that BJE rented to Black Magic. There was no allegation or finding in the ULP case (or here) that Black Magic violated Section 8(a)(5) in any respect. Nonetheless, the record in the ULP case (and here) does seem to show that Black Magic violated BCOA by allowing the employees of another employer to operate and maintain equipment used at the mine. In fact Judge Lott concluded that ''keeping Osborn and Lawrence on [BJE's] payroll'' appeared to be ''a crude attempt by [Black Magic] to avoid its contract obligations'' with the Union.[4] I accordingly will proceed on the basis that the record in the ULP case proves that Black Magic failed to live up to BCOA's terms. But that contract violation is an issue between the Union and Black Magic. It does not render unlawful the compensation that BJE was paying to Lawrence and Osborn.

The record in the ULP case might also be read as showing that BJE knowingly participated with Black Magic in Black Magic's violation of BCOA's terms. Particularly in the absence of any finding of a violation of Section 8(a)(5), however, even that does not support a requirement that BJE pay backpay at BCOA rates.

[4] Id. at 672.

Judge Lott's recommended Order required that both Black Magic and BJE give Lawrence and Osborn ''an opportunity to join the Union,'' as discussed above. Requiring all of the backpay due Lawrence and Osborn to be computed at the contract rate is consonant with that requirement. But as also discussed above, the Board deleted that requirement. Additionally, Judge Lott's recommended Order treated BJE and Black Magic as though they jointly employed Lawrence and Osborn. Because Black Magic was and is a party to BCOA, that arguably is another reason to require that all backpay be computed at the contract rate. But the Board's ULP decision is clear that BJE and Black Magic are neither a single employer nor joint employers in respect to either Lawrence or Osborn.

The General Counsel contends that I should order Black Magic to put Osborn on as a full-time employee (prior to his discharge, he worked for BJE during the day and for Black Magic for a couple hours an evening) and to hire Lawrence. (Br. at 10.) Later in this decision I discuss why I am recommending that that proposal be rejected. But even assuming that the General Counsel's position in this respect is correct, that would not affect the rate to be used in computing the backpay that BJE owes Lawrence or Osborn.

My task in this proceeding is to effectuate the terms of the Board's ULP decision in determining the amount of backpay owed to the discriminatees. As discussed above, on the one hand that decision—by referring to the remedy section of Judge Lott's decision—points toward specifying that Lawrence's and Osborn's backpay be computed at ''the contract rate.'' On the other, the Board's ULP decision also suggests that the Board intended to reverse that facet of Judge Lott's decision (which would leave to this stage of this case the determination of the rate at which backpay is computed). Given this ambiguity, and given that the evidence adduced at the ULP hearing, viewed in light of the findings in the Board's ULP decision, offers no basis for computing the backpay owed by BJE at the contract rate, I conclude that the Board did not intend that I be required to use BCOA's levels of wages and benefits in setting backpay. I conclude, instead, that the Board's reference to the remedy section of Judge Lott's decision was to that part of the remedy section relevant to the Board's order, namely, computation of backpay on a quarterly basis from date of discharge to date of proper offer of reinstatement, less interim earnings, plus interest.

III. THE RELEVANCE OF THE FACT THAT BJE HAS NO EMPLOYEES

BJE's position is that it does not owe either Lawrence or Osborn any backpay at all. The Company's theory is that: (1) from the moment it discharged Lawrence and Osborn in May 1991 it has had no employees at all, apart from the owner of the Company (Wilkerson) and his wife; and (2) accordingly there has been no job in which to reinstate either Lawrence or Osborn.

It is undisputed that BJE's only employees in May 1991, apart from Wilkerson and his wife, were Lawrence and Osborn. It is also undisputed that BJE never replaced either Lawrence or Osborn after BJE fired them that May (apart from BJE's employment of Lawrence briefly in June 1991).

BJE's position amounts to a claim that, even had the Company not discharged Lawrence and Osborn for unlawful reasons on May 13, 1991, it would have discharged both em-

ployees for lawful reasons on precisely the same day. But had BJE shown that to be the case, the Board would have concluded that the Company had not violated the Act. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). To put it another way, the Board's determination that BJE violated the Act when it discharged Lawrence and Osborn on May 13, 1991, means that the Board also determined that BJE would not have terminated the employment of the two employees on that day for lawful reasons. That being the case, BJE does owe backpay to Lawrence and Osborn, apart from matters relating to interim employment.

There remains for consideration the question of whether, had BJE not fired Lawrence and Osborn on May 13, 1991, it would have terminated them for lawful reasons on some later date. But that is a question of the amount of the backpay owed to Lawrence and Osborn, not of whether they are entitled to any backpay at all. I consider that question later in this decision.

IV. LAWRENCE'S BACKPAY

A. *The General Counsel's Computations*

Lawrence worked for BJE as an equipment operator and, to a lesser extent, as a mechanic. BJE paid Lawrence $10 an hour (subject to the usual, government-mandated, deductions), with no benefits. BJE employed Lawrence from October 1990 until it fired him on May 13, 1991. BJE then again employed Lawrence, briefly, in June 1991. Except for BJE's offer of temporary employment in June 1991 (which offer Lawrence accepted), BJE has not offered to reinstate Lawrence.

The question is the amount of compensation that Lawrence would have received from BJE had the Company not fired him. See, e.g., *Hacienda Hotel*, 279 NLRB 601, 603 (1986).

The General Counsel undertook to carry that burden by: (1) showing what an equipment operator employed by Black Magic, Billy Medford, earned since May 15, 1991; (2) contending that Lawrence's backpay should be fixed at Medford's gross earnings, less Lawrence's interim earnings.[5]

In determining Lawrence's backpay, the General Counsel may use any formula that approximates what Lawrence would have earned but for BJE's unlawful discharge of Lawrence—any formula that is not ''unreasonable or arbitrary in all the circumstances.'' *Laborers Local 38 (Hancock Northwest)*, 268 NLRB 167, 168–169 (1983). On several grounds I consider the General Counsel's approach to be unreasonable and arbitrary in that the General Counsel's figures in no way approximate what Lawrence would have received from BJE had the Company not fired him.

To begin with, Black Magic paid Medford in accordance with BCOA, roughly approximating double what BJE paid Lawrence. The General Counsel contends that the Board's ULP decision requires use of BCOA compensation levels in fixing Lawrence's backpay. But as discussed in section II of this decision, I have concluded that the General Counsel's reading of the Board's ULP decision is wrong.

It would nonetheless be appropriate to use BCOA in establishing Lawrence's backpay if the record showed that the Union would have begun representing BJE's employees but for the Company's firings of Lawrence and Osborn and if the record further showed that BJE would have become a signatory to BCOA under those circumstances. But the record shows nothing of the kind. (The General Counsel does not contend that such events would have come to pass. And Wilkerson testified without dispute that neither the Union nor any of BJE's employees has ever asked BJE to deal with the Union as representative of the Company's employees.)

Secondly, the General Counsel's backpay computations assume that Lawrence, as a BJE employee, would have worked the same number of hours as Medford, a Black Magic employee. There is no basis in the record for that assumption.

No party disputes the accuracy of the interim earnings figures that the General Counsel attributes to Lawrence, except for the fact that the General Counsel admittedly overlooked Lawrence's work for BJE in June 1991. I accordingly have used those interim earnings figures, adding to it the $230 that Lawrence earned in June 1991 working for BJE.

B. *When, If Ever, Would BJE Have Terminated Its Employment of Lawrence*

As discussed in part III, supra, the Board's ULP decision holds that Lawrence would have continued to work for BJE for some unspecified period after May 13, 1991. But for how long?

Plainly there are facts and argument that support the proposition that BJE would in any event have laid off Lawrence soon after May 13, 1991.

To begin with, there is evidence in the ULP case to the effect that BJE had hired Lawrence only temporarily, and that the work for which BJE had hired him was about to end.

Secondly, there is the matter of the Union's policing of its contract with Black Magic. In June 1991 BJE provided excavating services in connection with work on Route 41A. Those services did not involve Black Magic. But apart from that highway work, by the spring of 1991 all of BJE's business was with Black Magic. And all of the work that Lawrence did for BJE was Black Magic bargaining unit work (apart from that work on Highway 41A). Because Lawrence's grievance had called the Union's attention to this situation, the argument can be made that the Union would have demanded that Black Magic preclude BJE from employing Lawrence in that capacity. It is obvious that one likely result could have been BJE laying off Lawrence. (The record in this backpay case shows that where the Union discovers that an employee of a Black Magic contractor is performing Black Magic bargaining unit work, the Union is indifferent about whether Black Magic responds to the situation by hiring the employee or by simply ordering the contractor to cease using the employee on Black Magic bargaining unit work.)

Thirdly, as noted above BJE rehired Lawrence about a month after the unlawful discharge (to operate equipment BJE was using on the Highway 41A job). Lawrence worked for a couple days. Then BJE laid him off. There is no contention that that layoff was unlawful. Arguably that represents still additional evidence that BJE would have laid off

[5] The General Counsel used Medford's pay as the basis for determining Lawrence's backpay (rather than some other Black Magic employee) because Black Magic hired Medford the day that B. J. Excavating fired Lawrence.

Lawrence for lawful reasons even had there been no unlawful discharge.

But evidence about the nature of BJE's business, about BJE hiring Lawrence as a ''temporary'' employee, about the kind of work that Lawrence did for BJE, about the Union policing the Black Magic contract, and about Lawrence's June work on Highway 41A is all part of the record that was before the Board in the ULP case. Yet the Board's ULP decision says nothing about the possibility of BJE terminating Lawrence because of such factors. I accordingly read the Board's ULP decision as concluding that Lawrence would have continued on as a BJE employee for some indefinite period of time. The question, then, is whether there is new evidence evidence first adduced in the backpay case that shows that BJE would have terminated Lawrence's employment.

In that connection, I have considered the following:

First, there is additional evidence of the Union's policing of its contract with Black Magic. Black Magic employed Johnny Pryor as a mechanic. Black Magic treated Pryor, however, as a ''contractor'' rather than as an employee. In September 1992 the Union told Black Magic that it considered Pryor's work to be bargaining unit work. (Black Magic thereupon put Pryor on its payroll as a bargaining unit employee.) But Pryor had worked for Black Magic as a ''contractor'' for 16 months (from May 1991 to September 1992) before the Union took any action. And even then the Union acted only after some Black Magic employees, upset because Black Magic was employing Pryor for more hours than Black Magic was employing them, complained about Pryor's nonunion status. I accordingly conclude that the Union's response to Pryor fails to show that the Union would have demanded that Black Magic stop BJE from having Lawrence perform Black Magic bargaining unit work.

Second, BJE has continued to function without any employees. (For a while, BJE's only employees were Wilkerson and his wife. Now BJE has no employees at all.) But BJE had no employees when the ULP case was tried. I do not consider the continuation of that state of affairs to constitute new evidence showing that BJE would no longer employ Lawrence even absent the Company's unlawful action in May 1991.

Third, BJE points out that Wilkerson suffered life-threatening medical difficulties in the summer of 1992. But BJE remains in business with Wilkerson its owner. Moreover Wilkerson is healthy enough to continue to operate equipment for Black Magic.

Fourth, Lawrence, since leaving BJE, has from time to time found employment that pays considerably more than did BJE. But all of this post-BJE employment has been temporary. I find that it fails to show that Lawrence would voluntarily have left BJE.

I conclude that the evidence adduced in this backpay case fails to show that BJE would have terminated its employment of Lawrence.

C. *My Backpay Computations*

Fixing Lawrence's rate of compensation for backpay purposes is straightforward. BJE paid Lawrence $10 an hour, with overtime pay of $15 an hour for all hours over 40 per week. BJE paid Lawrence no benefits whatever.

Determining the number of hours Lawrence would have worked since his discharge by BJE is more difficult. My conclusion is that the appropriate measure of the number of hours that Lawrence would have worked but for his unlawful termination is Lawrence's average weekly hours worked for BJE during the period February 3 through May 11, 1991. I recognize that Lawrence began his employment with BJE in October 1990. But the record in the ULP case shows that BJE initially hired Lawrence to ''help . . . wind up'' various nonmine jobs. It was not until February 1991 that Lawrence began the work from which he was unlawfully discharged operating BJE's equipment at Black Magic's mines.

During the 14 weeks February 3 through May 11 Lawrence worked a total of 514.5 hours, including 29 overtime hours.[6] That works out to average 34.68 straight-time hours per week and 2.07 overtime hours per week, for average gross pay of $377.86 per week. That, in turn yields the following assumed pay per quarter, beginning May 13, 1991, and net backpay:

Year	*Quarter*	*Number of Weeks*	*Gross Backpay*	*Net Interim Earnings*[7]	*Net Backpay*
1991	2	7	$2,645.02	[8]$499.45	$2,145.57
	3	13	4,912.18	0.00	4912.18
	4	13	4,912.18	3,924.14	988.04
1992	1	13	4,912.18	727.00	4,185.18
	2	13	4,912.18	6,877.26	0.00
	3	13	4,912.18	10,018.32	0.00
	4	13	4,912.18	4,550.00	362.18
1993	1	13	4,912.18	800.00	4112.18
	2	13	4,912.18	4,350.00	562.18
	3	13	4,912.18	6,582.00	0.00
	4	13	4,912.18	5,327.00	0.00
Total net backpay through the 4th quarter of 1993: $17,267.51					

[6] From Jt. Exh. 5 in the ULP case.

[7] Lawrence incurred no interim expenses.

[8] Includes $230 for 23 hours work for BJE.

My computations end with the fourth quarter of 1993 because the record does not include interim earnings figures for subsequent periods.[9] But Lawrence's backpay continues to accrue at $4,912.18 per quarter ($377.86 per week) less net interim earnings.

I recognize that my computations are predicated on numerous unprovable assumptions. For example, they assume that, for more than 2-1/2 years, Lawrence would have taken no more than a day or two off at a time. But uncertainties of this nature are to be resolved against the Respondent whose conduct made certainty impossible. E.g., *88 Transit Lines*, 314 NLRB 324 (1994).[10]

V. BLACK MAGIC'S OBLIGATIONS TOWARD LAWRENCE

As discussed in part I, above, the Board's ULP decision concluded that, at the time Lawrence was fired (in May 1991), he was an employee of BJE, not of Black Magic; BJE must offer to reinstate Lawrence; and BJE and Black Magic must jointly and severally make Lawrence whole for the loss of earnings and other benefits the Lawrence suffered as a result of BJE's unlawful termination of Lawrence's employment.

The General Counsel urges me to go beyond these remedies by requiring Black Magic to hire Lawrence into a bargaining unit position. The General Counsel gets there this way. BCOA (says the General Counsel) precludes Black Magic from using BJE employees to do the kind of work that Lawrence was doing. That means that Lawrence could not have continued to work for BJE at Black Magic's mine even had BJE not unlawfully fired him. And that means that Lawrence's backpay period is exceedingly short—nonexistent, perhaps—unless Black Magic is deemed to have an obligation to hire Lawrence. In the General Counsel's words—

> Respondents should not be permitted to use subterfuge and form-over-substance defenses to evade the Board's order by being excused from reinstating both employees [Lawrence and Osborn]. The administrative law judge should order both discriminatees reinstated to WORK they were performing prior to the discrimination against them, no matter to which Respondent it has been shifted. Practically this could be accomplished by ordering Respondent BJE to reinstatement them and ordering Respondent Black Magic to transfer them promptly to its payroll. [Br. at 10; emphasis in original.]

I consider this remedy proposal of the General Counsel to be entirely inappropriate. To begin with, the Board did not find that Black Magic unlawfully failed to hire Lawrence. Yet the General Counsel's proposal amounts to asking for a failure-to-hire remedy. Further, even assuming that the General Counsel's proposal might conceivably be appropriate to remedy a violation by Black Magic of Section 8(a)(5), I note (again) that the General Counsel has not alleged, and the Board did not find, that Black Magic violated Section 8(a)(5) of the Act. Lastly, if in fact the Union, in May 1991, would have required Black Magic to cease using the services of BJE employees in work of the kind being performed by Lawrence, then that, quite properly, should be taken into account in determining Lawrence's backpay. No ''form-over-substance'' or evasion of the Board's order would be involved. (In any event, as discussed earlier I read the Board's ULP decision as concluding that Lawrence would have continued in BJE's employ for an indefinite period.)

VI. OSBORN'S BACKPAY

BJE employed Osborn during the day to fuel, grease and clean its equipment and to run errands. BJE paid him $5.50 an hour. Osborn worked part-time for Black Magic in the evenings (between 1 and 3 hours per evening), using a small shovel to clean excess mud off the tracks of tracked equipment such as bulldozers. Black Magic paid Osborn $20 for each evening he performed such work. Both Black Magic and BJE fired Osborn on May 13, 1991, because he had filed a grievance with the Union. The Board ordered both employers to reinstate him and to pay backpay to him.

The Board, however, does not award backpay to an unlawfully discharged employee if the employee thereafter fails to undertake a reasonable effort to find substantially equivalent employment. E.g., *EDP Medical Computer Systems*, 302 NLRB 54 (1991); see *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 200 (1941). The evidence shows that Osborn failed to make such an effort.

A. *Osborn's Job Hunting Efforts*

During the 3 years and 2 months between Osborn's discharge by Black Magic and BJE (in May 1991) and the backpay hearing (in July 1994), Osborn never applied for work at any mine. Nor did he apply for work at any other establishment in which employees performed work similar to Osborn's work for BJE or Black Magic. In fact Osborn did not walk into, or even telephone, any employer's facility and ask about a job not once.

Osborn did look for work. He did so mostly by asking family members, friends, and acquaintances if they had any work for him to do or if they knew of any work he might do. (Osborn asked at least one member of this group about work at least once a week.) That approach to job hunting included two attempts to find mine employment. In one case, Osborn heard a rumor that an acquaintance, Tommy Powell, was planning to ''start a new mine.'' When Osborn happened to come across Powell, Osborn asked if work was available. (There was not.) In another, Osborn asked a friend who worked at a mine if work was available there. (His friend said that there was, but only for skilled employees.)

Occasionally Osborn also has sought employment from people he did not know, but only when favorable circumstances happened to present themselves. For example, if, say, he was on his way to visit a relative and he saw farmers working in a field, he might stop and ask them about work. (Osborn did that during the summers, about three times a month.) On the other hand, Osborn has driven past the area's two biggest factories but has never stopped at either to inquire about employment.

[9] Because my backpay computations are figured on a weekly, Sunday through Saturday, basis (see the above-cited Jt. Exh. 5), the gross earnings figures are based on the period ended Saturday, December 25, 1993.

[10] No one contends that Lawrence failed to make a reasonable effort to find interim employment. In any case, I find that Lawrence did make such an effort.

Additionally, Osborn visited the local state employment services office to ask about work. But he only did so on four occasions. (Osborn testified that he did not visit that office more frequently because he was told that he would be contacted at his home address if that office located work for him. But Osborn moved three times since 1991 and did not inform the office of his new addresses.)

If Osborn's reliance on family, friends, and acquaintances and on farmers he happened to see as he drove past had kept him busy, one might conclude that his failure to apply for employment in the normal manner might be a function of a decision by Osborn about how best to spend his time looking for work. In fact, however, Osborn has been unemployed an exceedingly high percentage of the backpay period, as the following table shows.

Time Period	*Osborn's Employment*	*Job-by-Job Earnings*	*Total Quarterly Earnings*[11]
1991			
May 14–31	None		
June	''I [did some] wood cutting and sold it . . . . I cut some wood down at my brother's house.''	$100	
May–June	Total Quarterly Earnings), 2d 1/4, 1991 (after discharge from BJ and Black Magic)		$100
July	Osborn mowed grass for his mother and two other home owners.		75
August	None		
Sept.	Yard work	50	
July–Sept.	Total Quarterly Earnings, 3d 1/4, 1991		125
October	Osborn cleaned a fence row for his brother's landlord—he cut the briars and small brush away from the fence.	35	
November	Osborn cleaned a fence row for a friend	25	
December	Osborn worked on a tobacco farm over the course of two months. (The farmer had told Osborn's neighbor about the work; the neighbor told Osborn.)	65	
Oct.-Dec.	Total Quarterly Earnings, 4th 1/4, 1991		125
1992			
January	See tobacco farm work, above.	500	
February	None		
March	None		
Jan.-March	Total Quarterly Earnings, 1st 1/4, 1992		500
April	Yard work—raking leaves, etc. Osborn found the work ''through family.''	50	
May	Osborn cut a tree down for someone. (Osborn got the job ''through family.'')	20	
June	Five days of farm work (at 20 per day)	100	
April-June	Total Quarterly Earnings, 2d 1/4, 1992		170
July	Osborn cleaned copper & sold it for junk (i.e., self-employment)	133	
August	None		
Sept.	Helped tear down a building.	45	
July-Sept.	Total Quarterly Earnings, 3d 1/4, 1992		[12]310
October	Yard work for his mother 35)	35	
	Construction work	40	
November	None		
December	None		
Oct.-Dec.	Total Quarterly Earnings, 4th 1/4, 1992		75
1993			
January	Osborn sold some wood—a friend let him cut wood on the friend's property	35	
February	Sold wood (see January, above)	35	
March	None		
Jan.-March	Total Quarterly Earnings, 1st 1/4, 1993		70
April	Osborn helped someone move into the trailer next to his in the trailer court	20	
May	Osborn helped his landlord set up a trailer	25	
June	Osborn helped the landlord move a trailer	50	
April-June	Total Quarterly Earnings, 2d 1/4, 1993		95

[11] Interim earnings from Appendix A-1 of the General Counsel's compliance specification. Data are provided only through December 1993. Job-by-job earnings from Osborn's testimony and from R. Exh.

[12] The sale of copper for junk in July 1992 produced $265, the figure used by the General Counsel for interim earnings purposes. But Osborn undertook this entrepreneurial effort with his brother, with whom Osborn split the profit.

Time Period	*Osborn's Employment*	*Job-by-Job Earnings*	*Total Quarterly Earnings*[11]
July	None		
August	None		
September	Osborn cleaned up a yard for a roofer. He heard about through a friend, whose brother asked Osborn if he would do the work.	70	
July-Sept.	Total Quarterly Earnings, 3d 1/4, 1993		70
October	Yard work for his mother	10	
	And again Osborn cleaned up a yard for the same roofing company	65	
November	None		
December	None		
Oct.-Dec.	Total Quarterly Earnings, 4th 1/4, 1993		75
1994			
January	Osborn helped his brother clean some motors.	115	
	Hauled rock.	88	
February	Osborn worked for the roofing contractor for 5 days.	100	
	Hauled rock.	15	
March	None		
April	The owner of a ''pay lake'' (fishing for catfish for a fee) is a friend of Osborn's; he asked Osborn to help wait on customers; Osborn agreed and worked there for 2-1/2 weeks. Osborn got the job through another friend, who also works at the pay lake.	340	
May	Osborn and his brother hauled junk away for their sister. They sold the junk.	68	
June	Osborn drained a lake for a friend.	116	
July	Osborn mowed his mother's yard. His mother started paying him 25 per month to do that.	50	

The General Counsel points to the fact that the job market in Madisonville was affected by the recession during much of the backpay period. But Osborn did not stop applying for work because his initial efforts were so disappointing. He never applied at all. The General Counsel also contends that the Board should excuse Osborn for not applying for work because of Osborn's limited education—Osborn never finished ninth grade. But the situation is not that Osborn stopped applying for work after his initial applications were rejected because of his school record. Again, he did not apply at all. Moreover, even assuming that Osborn could be excused, because of his lack of education, from having failed to make written applications for work, Osborn did not even make oral inquiries about work. (I note, in this regard, that Lawrence found employment by just such oral inquiries.) And as Osborn's testimony in this proceeding shows, his verbal skills are more than sufficient for that.

Osborn, at age 30, is of prime working age. He was not sick or disabled during any part of the backpay period. Yet he looked for work only where it was easiest and most comfortable to do so, not where work was likely to be found. The question of whether a discriminatee fulfilled his or her obligation to look for work can be a difficult and agonizing one to answer. That is not the case with Osborn. He plainly is not entitled to backpay from either Black Magic or BJE.

B. *Other Matters Regarding Osborn*

Having concluded that Osborn did not reasonably look for interim employment, I need not consider other matters pertaining to Osborn's backpay. Two issues nonetheless merit some mention.

One is whether Black Magic ever offered to reinstate Osborn. (It is undisputed that BJE did not.) The work that Osborn performed for Black Magic was bargaining unit work. Nonetheless, the terms of his employment did not comply with BCOA. In November 1993 Black Magic offered to reinstate Osborn into his former job. When Osborn asked the Company for further information, he was advised that Black Magic had in mind all facets of the job from which Osborn was discharged in May 1991, including pay of $20 per night (which is much less than BCOA rates). That opens the question of whether Black Magic's reinstatement offer complied with the reinstatement requirement set forth in the Board's ULP decision. (Thus, the General Counsel argues that a valid offer of reinstatement would have had to have provided for terms that complied with BCOA.) The answer to this question is not altogether obvious. And because my conclusion about Osborn's failure to undertake a reasonable search for interim employment moots the issue, I leave it unresolved.

Another matter worth mentioning is the manner in which the General Counsel computed Osborn's backpay. I consider that, for a number of reasons, the General Counsel proceeded in an obviously unreasonable manner, including: (1) as discussed in connection with Lawrence, the General Counsel erred in using BCOA compensation rates for measuring the backpay resulting from BJE's discharge of Osborn; and (2) even assuming that Black Magic would have begun paying Osborn at BCOA rates had the Company not fired him in May 1991, the approach used by the General Counsel plainly resulted in backpay figures far in excess of what Osborn would have earned but for his unlawful discharge.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

ORDER

The Respondents, Black Magic Resources, Inc., and B. J. Excavating Company, Inc. (BJE) , their officers, agents, successors, and assigns, shall jointly and severally pay to Terry Lawrence, subject to normal government-mandated deductions: (1) for the period May 13, 1991, through December 25, 1993, $17,267.51 plus interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987); and (2) for periods subsequent to December 25, 1993, until such time as BJE makes a proper offer of reinstatement to Lawrence, backpay computed at $4,912.18 per quarter ($377.86 per week), less Lawrence's net interim earnings, plus interest.

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adopted by the Board and all objections to them shall be deemed waived for all purposes.